Supreme Court, U.S.
FILED
SEP 10 2003
OFFICE OF THE CLERK

(2)

No. 03-208

IN THE

Supreme Court of the United States

GOSPEL MISSIONS OF AMERICA, ET AL.,
Petitioners
v.
CITY OF LOS ANGELES, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROCKARD J. DELGADILLO,
City Attorney
EDUARDO A. ANGELES,
Managing Assistant City Attorney
JOHN M. WERLICH,*
Assistant City Attorney
**Counsel of Record*
JOCELYN CORBETT,
Certified Law Clerk

Los Angeles City Attorney's Office
Airport Division
1 World Way
Los Angeles, California 90045
(310) 646-3260
Attorneys for Respondents

21 pp

QUESTIONS PRESENTED

Does a party have standing to challenge a law when the party is not factually subject to the law?

Does a prior court's finding of standing to challenge provisions in a law preclude a re-determination of standing in a future action?

Does a party have a right to challenge specific provisions in a law when it could have challenged them in an earlier proceeding but chose not to do so?

PARTIES TO THE PROCEEDINGS

The identities of the petitioners in this court are set forth in the Petition for a Writ of Certiorari. The respondents are the City of Los Angeles, a municipal corporation in the State of California; Henry Acosta, as an individual and in his official capacity; Shirley Flucus, as an individual and in her official capacity; and Ronald E. Marbrey, as an individual and in his official capacity.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

OPINION BELOW.....1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

REASON WHY THE WRIT SHOULD BE DENIED 4

A. The Opinion Of The Court Of Appeals Does Not Conflict With Relevant Decisions Of This Court 4

B. The Opinion Of The Court Of Appeals Does Not Conflict With A Decision Of Another Circuit Court Of Appeals, Nor Does It Conflict With Decisions Within The Ninth Circuit 9

C. Petitioners Misapprehend The Crucial Nature Of A Federal Court's Need To Find Standing 10

TABLE OF CONTENTS (Cont'd)

Page

D. The Ninth Circuit Opinion Is Consistent With This Court's Decisions About Claim Preclusion 11

E. Petitioners' Argument That Claim Preclusion Does Not Apply Because Of The Addition Of New Plaintiffs Since The First Action Is Unavailing.....12

F. The Ninth Circuit Correctly Did Not Address Questions Concerning Section 44.04 12

CONCLUSION 13

TABLE OF AUTHORITIES

Cases **Page**

Arizonans for Official English v. Ariz.
520 U.S. 43, 64, 117 S.Ct. 1055, 1067, 137 L.Ed.2d 170 (1997) 11

Babbitt v. United Farm Workers Nat'l Union
442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) 7

City of Lakewood v. Plain Dealer Publ'g Co.
486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed. 771 (1988) 5

Doe v. Bolton
410 U.S. 179, 188, 93 S.Ct. 739, 745, 35 L.Ed.2d 201 (1973) 8

Epperson v. Ark.
393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d (1968) 6

Flast v. Cohen
392 U.S. 83, 94, 88 S.Ct. 1942, 1949, 20 L.Ed.2d 947 (1968)
.....11

Freedman v. Md.
380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965) ...7

Gospel Missions of America v. Bennett
951 F. Supp. 1429 (C.D. Cal. 1997) 2

TABLE OF AUTHORITIES (Cont'd)

Cases **Page**

Gospel Missions of America v. City of Los Angeles
328 F.3d 548 (9th Cir. 2003) 1

Hodel v. Irving
481 U.S. 704, 711, 107 S.Ct. 2076, 2080,
95 L.Ed.2d 668 (1987) 11

Migra v. Warren City Sch. Dist. Bd. Of Educ.
465 U.S. 75, 77 n.1, 104 S.Ct. 892, 892, 79 L.Ed.2d
56 (1984) 12

Poe v. Ullman
367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989
(1961) 10

San Francisco Democratic Cent. Comm. V. Eu
826 F.2d 814 (9th Cir. 1987) 9

Thornhill v. State of Alabama
310 U.S. 88, 97, 60 S.Ct. 736, 742, 84 L.Ed. 1093
(1940) 7

Younger v. Harris
401 U.S. 37, 42, 91 S.Ct. 746, 749, 27 L.Ed.2d 669
(1971) 8

Va. v. Am. Booksellers Ass'n, Inc.
484 U.S. 383, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988)
.....6

TABLE OF AUTHORITIES (Cont'd)

Page

United States Constitution

Article III, Section 2 Clause 1 1

Municipal Statute

Los Angeles Municipal Code
§§ 44.00 - 4415 2
§ 44.04 12
§ 44.15 11

Rules of Court

Supreme Court Rule 10 10

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported, *Gospel Missions of America v. City of Los Angeles*, 328 F.3d 548 (9th Cir. 2003). The Opinion of that court is set forth as Appendix A to the Petition for Writ of Certiorari (Petition)[1].

JURISDICTION

Respondent does not disagree with the statement of jurisdiction set forth in the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent does not disagree with the statement of constitutional and statutory provisions at issue as set forth in the Petition, but notes that in addition to the provisions listed, the following should be included:

Article III, Section 2, Clause 1 of the United States Constitution:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases

---

[1] Petitioners mis-lettered their Appendices in the body of the Petition; Respondents will cite to the Appendix at which an opinion, order, etc., is actually set forth in the Petition.

affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different states, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

In 1994, Gospel Missions of America (Gospel Missions) filed a complaint in the District Court for the Central District of California, against the City of Los Angeles (City), challenging in its entirety the City's Charitable Solicitation Law (Ch. Sol. Law), Los Angeles Municipal Code §§ 44.00 – 44.15. District Court Judge Wardlaw ordered Gospel Missions to indicate specifically which provisions it was challenging, and to provide supporting legal authority for each such challenge. This was an important order, given that the Ch. Sol. Law contains over one hundred sections, subsections, and sub-subsections, many of which are mutually exclusive. Gospel Missions responded to Judge Wardlaw's order, choosing to challenge some provisions, yet leaving many provisions unchallenged.

Judge Wardlaw issued a published decision[2], holding some provisions of the Ch. Sol. Law to be unconstitutional

---

[2] *Gospel Missions of America v. Bennett*, 951 F. Supp. 1429 (C.D. Cal. 1997) [set forth in Petition for Writ of Certiorari as Appendix G].

and others to be constitutional, but did not discuss those provisions which Gospel Missions chose not to challenge. In 1997, the City of Los Angeles carefully revised various provisions of the Ch. Sol. Law in compliance with Judge Wardlaw's holding; it deleted passages that Judge Wardlaw said were facially unconstitutional, and added language to some provisions to more narrowly tailor their requirements.

In 1999, Gospel Missions filed another complaint, alleging contempt of Judge Wardlaw's injunction, and challenging the constitutionality of amended and non-amended provisions. The contempt allegation was the appropriate mechanism for Gospel Missions to enforce the earlier decision. And indeed, District Court Judge Wilson, in the second action, addressed Gospel Missions' contempt allegations and constitutional challenges, albeit not in Gospel Missions' favor.

In 2000, Gospel Missions appealed Judge Wilson's decision, arguing in part that the question of whether they had standing to challenge certain provisions in the Ch. Sol. Law was issue precluded by Judge Wardlaw's earlier decision. In 2003, the Court of Appeals held that standing was not issue precluded by the first case, found petitioners did not have standing to challenge those provisions, and accordingly upheld Judge Wilson's holdings as to those sections. Opinion at 555. Additionally, the Court of Appeals held that petitioners were claim precluded from challenging other sections, because they could have challenged those sections in the first complaint but chose not to do so. Opinion at 556. Further, the Court held that Gospel Missions and each of the individual members in the second action were either parties to or in privity with the parties to the first action. Opinion at 556-557. The Court made this holding because Gospel Missions specifically

stated that Gospel Missions and the individual plaintiffs were in privity with the plaintiffs from the first action.

Finally, the Court of Appeals remanded to the District Court for further proceedings concerning Gospel Missions' challenge to two subsections of the Ch. Sol. Law on vagueness, overbreadth, and equal protection grounds. Opinion at 556. Indeed, petitioners and respondents have filed pleadings on the matter to Judge Wilson, and arguments are scheduled to be heard on September 15, 2003.

REASONS WHY THE WRIT SHOULD BE DENIED

This case does not meet the criteria for the issuance of a writ of certiorari as set forth in Rule 10 of the Rules of this Court, and the Petition should be denied. Petitioners have offered no compelling reason why the writ should be granted. The decision of the Ninth Circuit Court of Appeals does not conflict either with the decisions of this Court or of other circuits of the Courts of Appeals.

Further, as part of the case was remanded to the trial court for further proceedings, the Ninth Circuit decision cannot be considered to be a final judgment; accordingly, it is not appropriate for petitioners to request a writ by this Court at this time.

A. The Opinion Of The Court Of Appeals Does Not Conflict With Relevant Decisions Of This Court.

Petitioners cite five decisions of this Court finding a party had standing to challenge an ordinance even though the ordinance had not been enforced against the party. Petitioners fail, however, to provide any analysis which

demonstrates the similarities of those decisions with the opinion of the Ninth Circuit in this case. Petitioners merely list the decisions and provide a one-sentence parenthetical description of the holding in each case. This is not sufficient to demonstrate a conflict between these cases and the Ninth Circuit Opinion. Petitioners offer these cases as analogous to the facts of the instant case, and therefore contend that a conflict exists. This is not an accurate analogy.

These Supreme Court decisions have one thing in common: whether the statute had been enforced or not, whether a license had been applied for or not, the plaintiffs were subject to the statute and/or license requirements.

Respondents provide a brief summary of each referenced decision for the Court's convenience:

City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988).

Plain Dealer wanted to put coin-operated newspaper dispensing devices on city sidewalks. The City of Lakewood had an ordinance which prohibited placement of a private structure on public property. After losing at the District Court, the City was given an opportunity to amend its law. Plain Dealer was not satisfied with this amended version, chose not to apply for a permit, and amended its complaint to challenge the amended law. *Id.* at 754. The Court found Plain Dealer had standing to bring a facial challenge to the ordinance, even though they had not applied for a permit.

> "Recognizing the explicit protection accorded speech and the press in the text of the First Amendment, our cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or

> deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license."
> 486 U.S. at 755, 756 [emphasis added].

Va. v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988).

Virginia enacted a statute, similar to one upheld by this Court in an earlier case, "prohibiting sale to those under seventeen of materials deemed harmful to juveniles." *Id.* at 386. Virginia later amended the law to make it a crime to "knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse" these materials. *Id.* at 387. American Booksellers challenged the amended statute before it became effective. Virginia argued that they lacked standing because they did not suffer sufficient harm and that the harm was economic rather than speech related. *Id.* at 392. Further, the state argued the challenge was premature, because the statute had not yet become effective. *Id.* Because plaintiffs "alleged an infringement of the First Amendment rights of bookbuyers," the Court found they had standing to challenge the ordinance. *Id.* at 393. The Court also found it was acceptable for plaintiffs to have challenged the ordinance before it became effective, because they "have alleged an actual and well-founded fear that the law will be enforced against them." *Id* [emphasis added].

Epperson v. Ark., 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

Arkansas adopted a statute in 1928 which prohibited the teaching of evolution in public schools. In 1965, the high school at which Epperson taught biology decided to assign a

textbook which included evolutionary theory. Concerned that she would be subject to dismissal by violating the 1928 statute, Epperson brought an action for declaratory and injunctive relief.

The majority opinion did not directly address standing. Justice Black's concurring opinion voiced concern of lack of a genuine case or controversy because the statute had never been enforced. However, counsel for Arkansas stated that, as a teacher in Arkansas public school system, Epperson would be subject to liability under the statute.

Freedman v. Md., 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

Freedman, a film exhibitor, challenged Maryland's censorship statute, which required exhibitors to first submit a film to the State Board of Censors and receive a license before exhibiting the film. Freedman had not submitted a film to the Board before filing his complaint. Freedman was found to have standing even though he had not first attempted to obtain the license because he was subject to the ordinance in its allegedly overly-broad form. "'One who might have had a license for the asking may ... call into question the whole scheme of licensing when he is prosecuted for failure to procure it.'" *Id.* at 56, citing *Thornhill v. State of Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940).

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979).

United Farm Workers National Union (UFW) challenged Arizona's Agricultural Employment Relations Act. The District Court had ruled on five provisions. The

Supreme Court found that UFW had standing to challenge three of the provisions, but did not have standing for the other two. Among the challenged provisions was a section specifying election procedures for employee representation. The Court found standing for this section even though UFW had not first attempted to invoke the Act's election procedures, because it was "not for lack of interest in representing Arizona farmworkers in negotiations with employers, but due to the procedures' asserted futility. Indeed the UFW has in the past sought to represent Arizona farmworkers and has asserted in its complaint a desire to organize such workers and to represent them in collective bargaining." *Id.* at 300. In its general discussion of standing, the Court noted:

> "When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.' *Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 745, 35 L.Ed.2d 201 (1973). But 'persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs.' *Younger v. Harris*, 401 U.S. 37, 42, 91 S.Ct. 746, 749, 27 L.Ed.2d 669 (1971)."
>
> 442 U.S. at 298 [emphasis added].

In the instant matter, petitioners are not and never have been subject to the professional fundraiser provisions

they wish to challenge[3]. Contrary to petitioners' assertion, standing is not denied merely because the City has not attempted to enforce the provisions against Gospel Missions. Rather, because these provisions can never be enforced against Gospel Missions, petitioners lack standing to challenge the provisions. Accordingly, petitioners' attempt to show a conflict between the Ninth Circuit Opinion and the Supreme Court cases referenced is unavailing.

B. The Opinion Of The Court Of Appeals Does Not Conflict With A Decision Of Another Circuit Court Of Appeals, Nor Does It Conflict With Decisions Within The Ninth Circuit.

Petitioners offer no evidence that the Ninth Circuit Opinion conflicts with the decisions of other Circuit Courts of Appeal.

The sole case petitioners cite for the proposition that the Ninth Circuit Opinion conflicts with its own decisions is *San Francisco Democratic Cent. Comm. v. Eu*, 826 F.2d 814 (9th Cir. 1987). Just as the Supreme Court decisions relied on do not help the petitioners' position, *Eu* too does not support their argument.

Eu concerned a challenge to sections of the California Elections Code, which "specify the membership of the state central committees of ballot-qualified political parties ... and prohibit both state and county central committees from endorsing candidates in party primaries." *Id.* at 817. Various county and state central committees challenged these sections. The State argued that the plaintiffs failed to raise a justiciable controversy, and that

---

3 Appendix F at 44a.

they lacked standing. *Id.* at 821. Justiciability was challenged because the State asserted that these provisions had never been enforced; the State relied on *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). In that case, a "ban on contraceptives was not justiciable because the ban had never been enforced during its seventy-five year history, even though 'contraceptives [were] commonly and notoriously sold...'" *Id.* at 822 [internal cite omitted]. The Ninth Circuit distinguished the facts of *Eu*, finding "no record that the relevant provisions have been 'commonly and notoriously' violated." *Id.*

The facts of *Eu* demonstrate that those plaintiffs were or would have been subject to the provisions, whether the provisions had ever been enforced or not. In the instant matter, Gospel Missions are not subject to the professional fundraiser provisions, and thus could never have those provisions enforced against it. Petitioners' attempt to analogize to *Eu*, as is their attempt to analogize to the Supreme Court decisions, is unavailing.

C. Petitioners Misapprehend The Crucial Nature Of A Federal Court's Need To Find Standing.

Petitioners argue that standing should have been issue precluded in the instant matter, and that the Ninth Circuit erred by making its own determination on the question of standing. This is patently contradictory to well-established principles of justiciability.

"The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies.'" *Flast v. Cohen*, 392 U.S. 83, 94, 88 S.Ct.

1942, 1949, 20 L.Ed.2d 947 (1968). "The existence of a case or controversy is a jurisdictional prerequisite to a federal court's deliberations." *Hodel v. Irving*, 481 U.S. 704, 711, 107 S.Ct. 2076, 2080, 95 L.Ed.2d 668 (1987).

"The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 64, 117 S.Ct. 1055, 1067, 137 L.Ed.2d 170 (1997).

The Ninth Circuit in the instant matter correctly and necessarily made its own determination as to whether petitioners had standing for the professional fundraiser provisions.

D. The Ninth Circuit Opinion Is Consistent With This Court's Decisions About Claim Preclusion.

Petitioners argue that the Ninth Circuit erred when it found petitioners may not challenge § 44.15 (the endorsement provision) of the Ch. Sol. Law because Gospel Missions never sought endorsement. However, petitioners' argument is based on the original Ninth Circuit Opinion,[4] which was withdrawn by the Ninth Circuit, and superceded by its current Opinion.[5] In the current published Opinion, the Ninth Circuit stated that the doctrine of claim preclusion barred petitioners from challenging this section, because they could have challenged it in the earlier proceeding but chose not to do so. Opinion at 556.

---

4 Set forth in Petition for Writ of Certiorari as Appendix E.

5 Set forth in Petition for Writ of Certiorari as Appendix A.

This Court has described claim preclusion as "the effect of a judgment in foreclosing litigation of a matter that has never been litigated, because of a determination that it should have been advanced in an earlier suit." *Migra v. Warren City Sch. Dist. Bd. Of Educ.*, 465 U.S. 75, 77 n.1, 104 S.Ct. 892, 892, 79 L.Ed.2d 56 (1984).

E. Petitioners' Argument That Claim Preclusion Does Not Apply Because Of The Addition Of New Plaintiffs Since The First Action Is Unavailing.

Petitioners try to argue that claim preclusion should not be applied in this matter because twenty of the twenty-six individual plaintiffs in the case were not part of the first action. Opinion at 556. This is a specious argument. Petitioners themselves stated in their complaint that the individual plaintiffs are members of Gospel Missions of America, and are in privity with the original plaintiffs. Opinion at 557.

F. The Ninth Circuit Correctly Did Not Address Questions Concerning Section 44.04.

Petitioners argue that "the appellate panel completely ignored Gospel Missions' challenge to section 44.04." Petition for Writ at 15. This is inaccurate. The Ninth Circuit did not address petitioners' challenge to this section because Gospel Missions' Opening Brief on Appeal to the Ninth Circuit contained no challenge to this section. The Ninth Circuit could not "ignore" a challenge that was not timely made.

CONCLUSION

The Ninth Circuit Opinion did not conflict with decisions of this Court, or with those of other Courts of Appeal or of its own circuit. It correctly applied well-established principles of justiciability and claim preclusion.

Petitioners have failed to provide any compelling reasons why petition should be granted in this matter. The case does not meet the criteria for issuance of a writ of certiorari, and the petition for a writ should be denied.

Dated: September 9, 2003

Respectfully submitted,

ROCKARD J. DELGADILLO,
City Attorney
EDUARDO A. ANGELES,
Managing Assistant City Attorney
JOHN M. WERLICH,*
Assistant City of Attorney
* *Counsel of Record*
JOCELYN CORBETT,
Certified Law Clerk

Los Angeles City Attorney's Office
Attorneys for Respondents